82-1186
82-1465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

—against—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER TRANS WORLD AIRLINES, INC.

RANDAL R. CRAFT, JR.*
PETER HOENIG
RANDI L. BRESLOW
HAIGHT, GARDNER, POOR & HAVENS
One State Street Plaza
New York, New York 10004
(212) 344-6800

Counsel for Amicus Curiae International Air Transport Association

*Counsel of Record

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Question Presented

Whether the separation of powers doctrine derived from U.S. Const. Art. II, § 2, cl. 2, was violated by the decision below of the U.S. Court of Appeals for the Second Circuit holding on non-Constitutional grounds that the cargo liability limitation of Article 22 of the Warsaw Convention, a treaty of the United States, is prospectively unenforceable in United States courts, even though no act of Congress abrogated the United States' adherence to the Convention and both Congress and the Executive Branch have treated the Convention liability limitations as binding and enforceable?

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Statement of Interest

This brief *amicus curiae* is submitted with the written consents of both parties to this case pursuant to Rule 36(2) of the Rules of the Court; these consents have been filed with the Court.

The International Air Transport Association (IATA) is an organization of 123 international air carriers, many of whom either represent or are more than 50% owned by foreign sovereign nations that are parties to the Warsaw Convention.[1] A list of IATA members, six of which are U.S. airlines, has been filed in App. I (at 66a).[2]

Because most of IATA's member carriers transport cargo (and passengers) to and from the United States and are subject to litigation in U.S. courts,[3] they are vitally affected by the decision below. IATA's member carriers carry on their day-to-day business in reliance upon the Convention framework, and they and their respective governments depend upon the good faith enforcement of its provisions by the United States. The Convention greatly facilitates international air commerce and establishes

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[1]All references to "Warsaw Convention" or "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 29, 1934, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11 (a treaty adhered to by the United States October 29, 1934 and by 126 foreign nations; reprinted in Appendix D to IATA's Petition for Leave to Intervene, etc. ("App.") at 26a).

[2]The purpose of IATA and its member airlines is (1) to promote safe, regular, and economical air transportation for the benefit of the peoples of the world, to foster air commerce, and to study problems connected therewith; (2) to provide a means for collaboration among air transportation enterprises engaged in international air transport and services; and (3) to cooperate with the International Civil Aviation Organization (ICAO), an arm of the United Nations, and other international organizations.

[3]If the air waybill is issued in the United States or the destination is the United States, they may be subject to suit here even if they are interline carriers. See Article 30(3) of the Convention.

uniform and predictable commercial criteria important to the conduct of business in international air cargo transportation. The Judicial nullification of the liability limitation provisions will severely and adversely affect IATA's members in their conduct of international air commerce.

Summary of Argument

I. By declaring the Warsaw Convention's cargo liability limitation unenforceable despite its unquestioned Constitutionality, the Court of Appeals has eviscerated the Convention and violated the Constitution's separation of powers doctrine.

A. The court disregarded the intent of the Convention's contracting parties. In order to facilitate international air transportation, the Convention establishes a relatively predictable, reliable, and consistent basis for resolving liability and damage disputes. The carriers are made presumptively liable for loss, damages, or delay of cargo shipments, in exchange for which the carrier's liability is limited. Negotiated as a balanced package of which the limitation of liability provision was a critical part, these and other provisions in the Convention were designed to prevent inconsistent local and national laws and rules from hindering international air commerce, either by creating unacceptable uncertainty and confusion among the airlines and shippers as to their rights and obligations or by exposing airlines to unlimited liability (and associated legal costs) imposed by legal systems whose procedures are unfamiliar and inconsistent. The changing world monetary situation has caused some transitory differences as to the standard of conversion to apply to the Convention's liability limitations, but, both in their court decisions and in their international negotiations, the parties have revealed a continuing commitment to the limitation of liability. Ignoring its duty to interpret the Convention so as to render it enforceable, the Court of Appeals has made *any* expression of liability limits unenforceable. Nothing could be further from the intent of the parties, including the United States.

B.1. The Court of Appeals has needlessly and improperly interfered with the United States' relations with its treaty partners and has undermined this country's diplomatic credibility. It is up to the executive and legislative branches to determine whether or not changed circumstances will be taken as making the provisions of a treaty no longer obligatory on the United States. The Court of Appeals should not be allowed to isolate the United States from its treaty partners or, since there has been no formal denunciation, expose the United States to sanctions or liability for breach of its treaty obligations. The absence of a formal denunciation reveals the political branches' desire to continue enforcement of the Convention and to avoid the severe commercial and diplomatic consequences of not enforcing this binding treaty.

B.2. No Congressional legislation has contradicted or superseded the Convention. Repeal of the Par Value Modification Act of 1973 did not mean that the official price of gold had been abandoned for all purposes; repeal did not preclude use of that price as the Convention's unit of conversion in this country. The legislative history makes no mention of the Convention; instead, it recognized that the official price of gold would continue to be used in various contexts, especially for international purposes. Basic principles of treaty and statutory interpretation do not permit the finding of an intention to abrogate or modify the Convention.

B.3. Furthermore, the Civil Aeronautics Board (CAB) has been given the authority by Congress to insure that international air transportation tariffs are lawful, and it has long approved tariff limitations expressed according to the official price of gold. This well-known practice, which continues to this day, has been acquiesced in by Congress, and it raises a presumption of Congressional consent to enforcement of the Convention's limitation of liability provisions in terms of the official price of gold.

Both Congress and the Executive Branch have continued to

treat the Convention liability limitations as binding and enforceable. Other parties to the Convention have consistently done the same. Thus, the decision of the Court of Appeals did not follow the applicable legal principles and was based on faulty reasoning; the decision should be reversed.

Argument

I. Failure to Enforce the Limitation of Liability Provisions of the Warsaw Convention Is a Violation of the Constitution's Separation of Powers Doctrine.

Under the separation of powers doctrine, the Judiciary may not abrogate or terminate a part of a Constitutional treaty[4] unless it finds this part of the treaty has been unquestionably superseded by subsequently enacted conflicting legislation that was clearly, definitely, and specifically in contemplation of the treaty superseded.[5] While professing its adherence to this basic principle, the Court of Appeals did precisely what it said it could not do.[6] It created, in effect, a judicial reservation to an existing treaty. In doing so, it also interjected the Judiciary into the delicate process of negotiating modifications to the Convention framework, a matter that the Constitution quite clearly dele-

[4]*Cf. Goldwater* v. *Carter*, 481 F. Supp. 949 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979); *Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890); *Reid* v. *Covert*, 354 U.S. 1, 16-17 (1957); *Terlinden* v. *Ames*, 184 U.S. 270 (1902); *Doe ex dem. Clark* v. *Braden*, 16 How. 635, 657 (1853). There was no suggestion by the Court of Appeals in *Franklin Mint* of any constitutional infirmity in the Warsaw Convention.

[5]*Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888). *See Cook* v. *United States*, 288 U.S. 102, 120 (1933); *United States* v. *Lee Yen Tai*, 185 U.S. 213, 22 S. Ct. 629, 632 (1902); *Union Pacific Railroad* v. *United States*, 99 U.S. 700, 718 (1879); *Valentine* v. *United States*, 299 U.S. 5, 10-11 (1936).

[6]It claimed to recognize that "it is not the province of courts to declare treaties abrogated. . . ." 690 F.2d at 311, n.26.

gates to the political branches of the United States Government. In addition, the Court of Appeals ignored the principle that the judiciary's role in interpretation of treaties' is "limited to giving effect to the intent of the Treaty parties." *Sumitomo Shoji American, Inc.* v. *Avagliano*, 457 U.S. 176 (1982). In the present controversy over the proper unit of conversion to be used for evaluating the Convention's limits of liability, analysis of the intent of the parties, including the United States,[8] requires use of the United States' last official price of gold (or, in the alternative, Special Drawing Rights).

A. The Parties to the Warsaw Convention Intend to Limit the Liability of Air Carriers in International Transportation

After the United Nations Charter, the Warsaw Convention (App. D) is the most widely adopted international treaty.[9] It was signed by the original parties in 1929 and has been continuously adhered to by the United States since 1934.[10]

The principal purpose of the framers of the Convention was to establish a uniform body of world-wide rules relating to, and limiting liability for, carriage of passengers and cargo in international air transportation.[11] The Convention establishes a relatively predictable, reliable, and consistent basis for resolving lia-

[7]U.S. Const. Art. III, §2, cl. 1.

[8]*See* Brief Amicus Curiae of the United States on Petition for Writ of Certiorari, at 15.

[9]A. Lowenfeld, *Aviation Law*, §4.1, at 7-98 (2d ed. 1981).

[10]Because it is self-executing, it needed no supplementary Congressional legislation to bring it into force. *Indem. Ins. Co. of North America* v. *Pan American Airways, Inc.*, 58 F.Supp. 338 (S.D.N.Y. 1944); *Garcia* v. *Pan American Airways, Inc.*, 269 A.D. 287, 55 N.Y.S. 2d 317, *aff'd*, 295 N.Y. 852, 67 N.E. 2d 257, *cert. denied*, 329 U.S. 741 (1946). *See Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 161 (1940).

[11]*See* Brief for Trans World Airlines, Inc. ("TWA"), "Statement of the Case".

bility and damage disputes arising from such transportation.[12] The carrier is made presumptively liable for loss, damage, or delay of cargo (Article 18),[13] and the *quid pro quo* is the limitation of its liability under Article 22 of the Convention.[14] The Convention provides that all such claims arising under its provisions can only be brought subject to its provisions (Article 24). It also sets forth notice of claim procedures (Article 26) and establishes the jurisdictions where claims may be adjudicated (Article 28).

Negotiated as a balanced package of which the limitation of liability provision was a critical part,[15] these provisions were designed to prevent the crazy-quilt of inconsistent local and national laws and rules from hindering international air commerce, either by creating unacceptable uncertainty and confusion among the airlines and shippers as to their rights and obligations or by exposing airlines to unlimited liability (and associated legal costs) imposed by legal systems whose procedures are unfamiliar and

[12]To this end, the Warsaw Convention defines the international transportation to which it applies (Article 1), the ticket and baggage check requirements for passengers (Articles 3 and 4), the air waybill requirements (Articles 5, 6, 7, and 8), the contractual implications of the cargo air waybill (Articles 9, 10, and 11), the rights of the consignor (shipper) and consignee (Articles 12, 13, 14, and 15), and certain customs requirements (Article 16).

[13]And as to passengers and their baggage (Article 17).

[14]*See Reed* v. *Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967). *See generally Minutes, Second International Conference on Private Aeronautical Law*, Warsaw, October 4-12, 1929 (Horner and Legrez trans. 1975). The presumptions of fault are contained in Articles 17-21 and Article 25 of the Convention.

[15]The importance of the balance is reflected in the Convention's reservation clause, which does not permit a country to issue any reservation except with respect to international transportation by air performed directly by the states.

inconsistent.[16] The Convention enables cargo to be shipped almost anywhere in the world on a single air waybill, pursuant to interline agreements based on the Convention. It has also made these shipments more economical by clearly allocating the risks of shipping and carrying cargo, thus minimizing overlapping liabilities (and the costs of disputing them) and avoiding unnecessary duplication of insurance coverage among those who are not self-insured.[17] This lowers the costs to everyone involved in international air cargo transportation and, ultimately, also lowers the costs to the consumers of products and parts that are shipped internationally by air.

The decision of the Court of Appeals conflicts with the "familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties." *Valentine* v. *United States*, 299 U.S. 5, 10 (1936); *Nielson* v. *Johnson*, 279 U.S. 47, 51 (1929).[18] In giving effect to that intention under changed circumstances, the Judiciary is to examine the conduct of the parties subsequent to ratification of the Treaty in order to ascertain the Treaty's proper construction. *See Pigeon River Improv. Slide and Boom Co.* v. *Charles*

[16]It should be noted that the United States legal system, consisting of fifty-plus jurisdictions with differing laws differently interpreted, generates its own internal inconsistencies, often unpredictably. For example, in this very case the Court of Appeals' far-reaching holding was neither sought, discussed, nor contemplated by any of the litigants, and most subsequent federal court decisions have not followed this holding. The Supreme Court is, of course, the final arbiter of these inconsistent approaches.

[17]Of course, under the Convention a shipper can avoid the liability limitation and shift the risk to the airline by simply declaring the full value of the cargo and paying an additional charge.

[18]Prior to *Franklin Mint*, the Second Circuit had followed this rule in Convention cases. *See Benjamins* v. *British European Airways*, 572 F.2d 913, 918 (2d Cir. 1078), *cert. denied*, 439 U.S. 1114 (1979); *Reed* v. *Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *reh'g denied*, 429 U.S. 1124 (1977).

W. Cox, Ltd., 291 U.S. 138, 153-63 (1934); *Kolovrat* v. *Oregon*, 366 U.S. 187, 192-194 (1961).

As recognized by the Court of Appeals for the Second Circuit in *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *rehearing denied*, 429 U.S. 1124 (1977), the delegates to the Warsaw Convention knew that in years to come civil aviation would change in unforeseen ways, yet "they wished to design a system of air law that would be both desirable and flexible enough to keep pace with these changes." The contracting parties accepted the inevitability of future modification of the agreement but committed themselves to make those adjustments within the Convention's basic framework.

One hundred and twenty-seven countries have agreed on the enduring need for the limitation of liability provisions and the related provisions described above.[19] Under any view, the contracting parties have manifested an intent to maintain the vitality of the Convention, including the limitation of liability concept, despite the ambiguities caused by the changing world monetary situation. Both in court decisions[20] and in international negotia-

[19]As a major exporter and importer, the United States has a special interest in seeing that these provisions remain in effect; more than those of most of other countries, American businesses are heavily involved in international air commerce and are dependent upon the Convention's provisions that make this commerce practical and economical.

[20]The following foreign cases demonstrate that foreign courts will select a Warsaw unit of conversion despite shifting currency bases: *Costell* v. *Iberia, Lineas Aereas de Espana, S.A.*, No. 255, First Civil Court of Appeals of Valencia (October 14, 1981) (reprinted in Appendix to TWA's Brief, "BA" 5); *Kislinger* v. *Austrian Airtransport*, No. IR 145/83 (HG) Wien (Commercial Ct. of App. of Vienna, June 21, 1983) (BA 11); *Rendezvous-Boutique-Parfumerie Friedrich & Albine Breitinger G.m.b.H.* v. *Austrian Airlines*, No. 14 R 11/83 (LG) Linz (Court of Appeals of Linz, June 17, 1983) (BA21); *Pakistan International Airlines* v. *Compagnie Air Inter S.A.*, No. 79/2278, Court of Appeals of Aix-en-

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tions concerning monetary limits,[21] the parties' conduct reveals a continuing commitment to limitation of liability.

To be sure, there are some differences among foreign courts as to the proper standard of conversion to apply to the Convention liability limitations. The Court of Appeals made much of this "disarray"; however, the court revealingly ignored the question of whether this so-called disarray reflects any intent of the contracting parties to have unlimited liability. Quite obviously, it does *not* reflect any such intent.

Indeed, the disarray noted by the Court of Appeals is nothing when compared with the chaos that would be created if the United States, which is involved in a substantial portion of the world's international air commerce, enforced no liability limit whatsoever. The Draconian decision to make any monetary ex-

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Provence, France (October 30, 1980) (reprinted in Joint Appendix, "JA" 133); *Hornlinie A.G.* v. *Societe Nationale Petroles Aquitaine*, Supreme Court of the Netherlands, 7 Eur. Trans. L. 933 (1972) (JA 114); *Companhia de Seguros Maritimos* v. *Varig*, Federal Court of Appeals of Brazil (June 3, 1975); *Kuwait Airways Corp.* v. *Sangri*, Bangalore, India (August 11, 1978) (JA 179); *Balkan Bulgarian Airlines* v. *Tammaro*, Court of Milan, Italy (October 25, 1976) (JA 176); *Fida Cinematografica* v. *Pan American World Airways*, Rome Civil Court, Italy (October 13, 1966); *Linee Aeree Italiane* v. *Riccioli*, No. 609/79, Rome Civil Court, Italy (November 14, 1978) (JA 97); *Florencia Cia Argentina de Seguros S.A.* v. *Varig S.A.*, Buenos Aires, Argentina, 1977 Uniform L. Rev. 198 (August 27, 1976) (JA 169); *Zakapoulos* v. *Olympic Airways Corp.*, No. 256/74, Court of Appeal, 3d Dep't Athens, Greece (February 15, 1974) (JA 165). *Cf. Chamie* v. *Egyptair*, No. 80-12.428, Cass. civ. com., France (March 7, 1983) (BA1).

[21] *See, e.g.*, the Hague Protocol, 478 U.N.T.S. 371 (1955); the Montreal Agreement, CAB Agreement No. 18990, 31 Fed. Reg. 7302 (1966); the Guatemala City Protocol (1971), reprinted in A. Lowenfeld, *Aviation Law, Documents Supplement* at 975-984 (2d ed. 1981); the Montreal Protocols Nos. 3 and 4 (1975), reprinted in A. Lowenfeld, *Aviation Law, Documents Supplement* at 985-1001 (2d ed. 1981) (see n. 37 *infra*).

pression of the Convention's cargo liability limit unenforceable is farther from what was intended by the framers and signatories than any of the options rejected by the Court of Appeals.

The decision of the Court of Appeals destroys just what the Convention was designed to achieve. The above-described practical and economic advantages of the Convention would be irreparably undermined,[22] with far-reaching manifestations.[23] For

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[22]In recognizing the problems that would result from nullifying the Convention limitation of liability, the Court of Appeals suggested that the filing of reformulated tariffs with the CAB might establish a new limit of liability. 690 F.2d at 312. The suggestion is unrealistic. International tariffs must be reciprocally consistent. Their reformulation would involve innumerable intricacies and unavoidable delays. In some countries, new enabling legislation, new operating agreements, and new regulatory approvals may have to precede amendment of conditions of contract and air waybills by foreign air carriers. Tariff reformulation in this country would also be subject to a time-consuming process and would not necessarily be successful. Even if new tariffs and new procedures were ultimately permitted, they would not have the permanence or recognition of a treaty provision. They would also be subjected to burdensome legal challenges covering the issues mentioned above, as well as additional issues relating to, *inter alia*, the continued viability of the presumption of liability under Article 18 of the Convention; the required content of new notices of liability limitations; the effect of deregulation's abolition of domestic tariffs and the concomitant potential unavailability of constructive notice of liability limitations on domestic legs of international carriage (see note 47, *infra*); and the effect of possibly inconsistent findings on similar issues by courts of various jurisdictions, domestic and foreign. Indeed, Franklin Mint's attorney has already suggested that, in the absence of a Convention limit, *any* tariff attempting to limit liability would be unenforceable under the Convention. Remarks of John Foster, Esq., Luncheon of the Air Transportation Law Committee and the Water Transportation Law Committee of the Federal Bar Association, December 7, 1982, Washington, D.C.

[23]In fact, *Franklin Mint* has already been applied in a personal injury case as the basis for a holding that the Convention's limits on liability for personal injury are not enforceable in United States courts. *See In re*

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example, there are thousands of international air cargo claims each year, and, because of the limitation provisions, almost all of these cargo claims have been settled. However, the decision below will make settlement much more difficult[24] and dramatically increase the number of cases filed, litigated, and ultimately tried.[25]

The many severe consequences of not enforcing the Convention provide reason enough for courts to follow the recognized principle that, when nations have agreed upon a treaty, it cannot be disregarded. Here, the Court of Appeals ignored its duty to interpret the Convention so as to render it enforceable. There can be no question but that the contracting parties intended, and still intend, to limit the liability of international air carriers because the limitation is critical to the Convention's balance and to the very uniformity, stability, predictability, and reliability that the Convention was designed to provide.

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Aircrash at Kimpo International Airport, Korea on November 18, 1980, 558 F. Supp. 72 (C.D. Cal. 1983), *interlocutory review denied,* No. 83-8051 (9th Cir. May 13, 1983). For a number of reasons in addition to those outlined in the present cargo case, the *Kimpo* holding is unsound. And if this Court permits the unenforceability holding to be asserted in passenger cases, the upheaval and adverse foreign government reaction would be greatly magnified.

[24]With the presumption of liability and the *quid pro quo* of limitation thereon, the issues and proof of a claim are limited. If the Convention were not in existence, proof of delivery, events, defenses, etc., would complicate the issues and the facts in every case.

[25]If the failure to enforce the liability limits results ultimately in foreign diplomatic action terminating the Convention, United States courts will also find themselves faced with many cases that, under Article 28 of the Convention, would have to have been instituted elsewhere.

B. Both Congress and the Executive Branch Consider the Limitation of Liability Provisions of the Warsaw Convention To Be Binding and Enforceable

1. The Court of Appeals Has Improperly Interfered with the Political Branches' Conduct of Foreign Relations

The Constitution reserves to the executive branch the power to negotiate and make treaties, with the advice and consent of the Senate.[26] The primacy of the political branches in the conduct of the Nation's foreign relations has always been a cornerstone of the Federal Judiciary's self-restraint.

The executive and legislative branches are in a better position than the Judiciary to assess not only the need for a treaty but also the potential diplomatic and commercial problems that would be caused by withdrawal from a treaty. It is up to the executive and legislative branches to determine whether or not changed circumstances, such as violation by other parties, will be taken as making the provisions of the treaty no longer obligatory on this country. *See, e.g., Taylor* v. *Morton*, 23 Fed. Cas. 784, 787 (No. 13,779) (Cir. Ct. Mass. 1855); *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889).

The Court of Appeals, unlike four other federal courts,[27] ignored the obvious intent of the United States to maintain the

[26]U.S. Const. Art. II, §2, cl. 2.

[27]*See Maschinenfabrik Kern, A.G.* v. *Northwest Airlines, Inc., et al.*, 562 F. Supp. 232 (N.D. Ill. 1983) (selecting last official U.S. price of gold in Warsaw cargo case); *Deere & Co.* v. *Deutsche Lufthansa* A.G., N.D. Ill. No. 81 C 4726 (Dec. 30, 1982) (selecting last official U.S. price of gold in Warsaw cargo case); *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F.Supp. 833 (E.D.N.Y. 1982) (selecting last official U.S. price of gold in Warsaw passenger case), *appeal denied on that issue*, No. 82-8018 (2d Cir. Aug. 19, 1982); *Boehringer Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981) (selecting free market price of gold in Warsaw cargo case), *appeal pending*, No. 81-2519.

Convention's liability limitation despite the transitory difficulties thus far in setting the conversion standard. By declaring that the limitation of liability provision of the Convention is unenforceable in "United States Courts",[28] the Court of Appeals unilaterally took, in effect, precisely the action that the political branches declined to take when, as discussed below, rather than denounce this treaty, they determined to work with other nations for its modernization.

Courts "should hesitate long before limiting or embarrassing" the sovereign powers of the United States, particularly as they concern foreign affairs. *MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915), quoted in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936). The Court of Appeals' decision would isolate the United States from its treaty partners[29] and place in doubt whether this nation "speaks with one voice" with respect to foreign affairs. *See Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976); *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752-53 (1978); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). Striking a pivotal part of the Convention would adversely affect the United States' initiatives and commitments in negotiations for modernization of the Convention and, indeed, in other international negotiations.[30]

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[28]690 F.2d at 304.

[29]The United States is regarded as an important party to the Convention because of the relative size of its aviation industry and its relatively large share of the international air traffic, but as this Court noted in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), the day is long past when our courts can adhere to the "parochial concept" that "trade and commerce in world markets and international waters [be] exclusively on our own terms, governed by our law, and resolved in our courts." *See also Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516, *reh. denied*, 419 U.S. 885 (1974).

[30]The United States itself has, in its Brief Amicus Curiae on the Petition for Writ of Certiorari in the present case, at 2, stated:

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In addition to creating problems of diplomatic credibility, the failure to enforce the limitation of liability provisions of a treaty that the United States continues to regard as binding[31] would also constitute a clear violation of the United States' obligations under the Convention and may subject this country to diplomatic retaliation and, more directly, to sanctions for breach of its treaty obligations. In other words, aside from entitling other parties to terminate the Convention or to suspend its operation in whole or in part, this material breach may also subject the United States to liability for reparations for damages sustained if, despite the absence of a formal denunciation by the United States, a foreign international air carrier is held liable for damages above the Convention limit.[32]

The potential commercial and diplomatic consequences are so severe that any intent of the political branches of government not to enforce the limitation of liability provisions of the Convention would be reflected first in extensive negotiations and then, if the negotiations were futile, in formal steps toward denunciation pursuant to Article 39 of the Convention. This is, of course, exactly what happened in 1965 when the United States

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> This decision, if allowed to stand, will have significant adverse consequences for the United States both in its immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of this country generally.

As evidence of this, the Solicitor General pointed out, at 2-3:

> The Department of State informs us that several foreign governments have expressed their view that the Court of Appeals' decision will seriously affect United States relations in international aviation.

[31]Brief Amicus Curiae of the United States on Petition for Writ of Certiorari, at 2.

[32]*Cf.* 14 Whiteman, *Digest of International Law* §27, at 285 (1970); V Hackworth, *Digest of International Law* §486, at 165 (1943).

decided that the Convention's limitation of liability for passenger injuries and death was too low.[33]

Thus, both logic and history demonstrate that formal denunciation should be a prerequisite to any judicial decision declining to enforce the critical limitation of liability provisions in the Convention. To date, there has been no such denunciation. Furthermore, there has not even been any expression of Congressional or executive *intent* to denounce the Convention.

2. No Congressional Legislation has Contradicted or Superseded the Convention

The Court of Appeals held that United States courts are prevented from enforcing the Convention's limits on liability be-

[33]Because of historical concern in the United States about the Convention limits of liability for passengers (but not for cargo), the U.S. has striven over the years to persuade the Warsaw parties to revise upwards those limits. The Hague Protocol, Sept. 28, 1955, 478 U.N.T.S. 371, the result of a 1955 conference of the Warsaw parties, doubled the Warsaw limit of liability for bodily injury or death (cargo limitations were not an issue). It was signed but never ratified by the United States. *See generally* A. Lowenfeld, *Aviation Law*, pp. 7-100-127 (2d ed. 1981). On November 15, 1965 the United States gave formal notice of denunciation of the Convention because of the parties' unwillingness to agree to increase sufficiently the bodily injury or death limit (again, cargo limitations were not the rationale). 50 Dep't State Bull. 923 (1965). In the wake of the adoption of the Montreal Agreement, the U.S. withdrew its notice of denunciation on May 13, 1966. 54 Dep't State Bull. 955-57 (1966). The Montreal Agreement, raising the limitation of liability of the Warsaw Convention to $75,000 for passenger injury or death on flights to and from the United States, was filed with and approved by the CAB on May 13, 1966 as an interim measure pending amendment of the Convention. CAB Agreement 18990. Cargo limitations of liability were not changed by the Montreal Agreement, for it was recognized that the limitations were only an issue between businessmen. Whatever the monetary limits, shippers could declare the full value of the cargo, thereby avoiding the liability limitations and putting the risks of loss or damage on the airlines, or they could take on the risks themselves, then either "self-insuring" those risks or arranging for insurance coverage (with appropriate deductibles).

cause repeal of the Par Value Modification Act of 1973[34] constituted "an explicit abandonment of the previously established unit of conversion" in the Convention.[35] This holding is superficial at best. The repeal did not mean that the official price of gold had been abandoned for all purposes and did not preclude its use as the Convention's unit of conversion in this country.[36] Neither the legislative history of the Par Value Modification Acts nor that of the statute of repeal makes any mention of the Convention. In fact, the legislative history of the repealing act reflects the Senate's recognition that there were other purposes for which the official price would still be used for determining the monetary value of gold. It was noted that the "only *domestic* purpose for which it is necessary" was to determine the value of gold held in the form of gold certificates. *See* 690 F.2d at 308, n.11. The clear inference was that there were other *international* purposes, but this was overlooked by the Court of Appeals. 690 F.2d at 309, n. 20, referring to n. 12 (*sic;* it should be n. 11). Clearly, the issue in this case is international, not domestic. In the first place, then, there is no basis for concluding that repeal of the Par Value Modification Acts was intended to affect the Convention in any way; second, there is even less basis for concluding that this repeal was intended to abrogate and make unenforceable the Convention's limitation of liability provisions.

Moreover, even if there were *some* arguable basis for finding such an intent, basic principles of treaty interpretation require a stronger basis than is available here. "[T]he intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Pigeon River Improv. Slide and Boom Co.* v. *Charles W. Cox,*

[34]Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), amended by Par Value Modification Act, 31 U.S.C. §449 (1973), repealed 1976 by Pub. L. No. 94-564, 90 Stat. 2660. The repealing Act was enacted in 1976 but became effective April 1, 1978.

[35]690 F.2d at 331.

[36]The discussion in the United States' Brief Amicus Curiae on Petition for Writ of Certiorari, at 10-14, of the background and effect of the repeal of the Par Value Modification Act is particularly incisive.

Ltd., 291 U.S. 138, 160 (1934), quoted in *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 413 (1968).

> A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.

Cook v. *United States*, 288 U.S. 102, 120 (1933). Furthermore, as has been stated regarding the rule established in *Cook*:

> This familiar rule should be strictly applied because relations with other countries are directly affected. Courts should be more hesitant to find that statutes of Congress modify or abrogate treaty provisions than to find that they repeal existing legislation because Congress was not the principal draftsman or actor in making the treaty part of the "supreme law of the land."

Itzcovitz v. *Selective Service Local Board No. 6, N.Y.*, 301 F. Supp. 168, 181 (S.D.N.Y. 1969), *appeal dismissed*, 422 F.2d 828 (2d Cir. 1970).

Therefore, if Congress had intended a result as drastic as disemboweling the world's second-most widely adopted treaty, it is reasonable to expect that it would have said so expressly. *See, e.g., Itzcovitz* v. *Selective Service Local Board No. 6, N.Y., supra; McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

That the Senate has thus far not ratified the Montreal Protocols[37] by a two-thirds vote is also no reflection of an intent to

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[37]Montreal Protocols 3 and 4 encompass the Guatemala City Protocol, which was drafted in February-March 1971 and which called for unbreakable limits of liability (liability without fault) of 1,500,000 Poincare francs for passenger injury or death and 15,000 francs for baggage. There was no proposed change to the cargo limitations.

(Footnote continued on following page)

denounce the Convention. Furthermore, the Executive branch continues strongly to support ratification and the Senate has not completed its consideration of the Protocols.[38] (Any disagreement between the political branches of the United States government regarding the Protocols would simply emphasize the inappropriateness of judicial intervention into this country's continuing relationship with the other signatories of the Convention.) The Senate's handling of the Protocols is relevant to the issues herein in one important respect—the debates reveal that the Senate clearly had the understanding that the Convention's liability limits were binding and enforceable (as modified by the Montreal Agreement). In the discussions about limiting liability, there was no suggestion by any Senator that Congress had already abrogated these limitations.

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Montreal Protocols 3 and 4, when in force, establish Special Drawing Rights (SDRs) as the unit of conversion for Poincare francs in Article 22(4) of the Convention. They would also raise the limit of liability for death or injury to 100,000 SDRs (approximately $105,000 today) and provide for individual nations' establishment of a Supplemental Compensation Plan for passenger death or injury. The unincreased limit for loss or damage to cargo would be 17 SDRs (approximately $18) per kilogram, regardless of fault.

[38]The United States, through the Executive branch, was a principal architect in the formulation of these protocols, and it signed them in 1975. They were forwarded to the United States Senate for advice and consent on January 14, 1977. See S. Exec. Rep. No. 45, 97th Cong., First Sess., at 3-7 (1981). A vote was taken on March 8, 1983; the Senate did not at that time obtain the required two-thirds majority in favor of ratification of Montreal Protocols 3 and 4. Fifty senators voted in favor, with forty-two against. After the vote was taken, the majority leader moved for reconsideration, and, consequently, the matter remains on the Senate calendar. 129 *Cong. Rec.* S. 2279 (daily ed. March 8, 1983). U.S. ratification would be subject to establishment of an adequate Supplemental Compensation Plan, as reviewed and approved by the CAB. S. Exec. Rep. No. 45, 97th Cong., 1st Sess., at 3-7 (1981).

Accordingly, the record shows that Congress has taken no action adversely affecting the viability of the Warsaw Convention or any specific provision thereof. The Convention, in its entirety, remains the law of the land.

3. Congress and the Executive Have Sanctioned Enforcement of the Convention's Liability Limits Using the Official Price of Gold

Under these circumstances, there is another basic principle of treaty interpretation that is relevant. A long-continued practice under a treaty, known and acquiesced in by Congress, raises a presumption of Congressional consent to it. *Dames and Moore* v. *Regan*, 453 U.S. 654 (1981) (citing *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). Consequently, it is significant that historically, and particularly since 1965, both the executive and legislative branches have looked to and relied upon the Civil Aeronautics Board (CAB) to deal with Convention issues involving limitations of liability.[39] Congress has delegated to the CAB authority to coordinate and review international airline matters and agreements[40] and the power and

[39]Over the years, the CAB has also been responsible for implementing other provisions of the Convention and its Protocols, particularly in recent years while coordination of the Montreal Protocols was in progress. For instance, in 1966 the Executive branch deferred to the CAB for review and approval of the compromise Montreal Agreement, CAB No. 18990, as an interim measure pending negotiation and ratification of a new treaty. And at the Senate hearings regarding the Montreal Protocols, the Senate Foreign Relations Committee received the views of the Board regarding the status of the Supplemental Compensation Plan (prepared pursuant to the Montreal Protocols), which is still pending before the CAB. *See Civil Aviation Protocols: Hearing Before the Committee on Foreign Relations, United States Senate*, 97th Cong., 1st Sess., at 6-8 (1981). Indeed, the Senate Foreign Relations Committee is looking to the CAB for a reevaluation of the proposed Supplemental Compensation Plan (*See* CAB Order 77-7-85) (July 20, 1977) as a condition subsequent to ratification; i.e., it would come into force *only* if the CAB makes a favorable determination. *See* S. Exec. Rep. No. 45, 97th Cong., 1st Sess. (1981).

[40]49 U.S.C. §§1382 and 1386.

duty to investigate and ensure that the tariffs governing foreign air transportation, including the limitation of liability for cargo carriage, are lawful, fair, and reasonable; and to suspend any tariff found to be unlawful.[41] These responsibilities of the CAB must, however, be carried out consistently with any treaty obligation of the United States.[42] Since the Warsaw Convention is self-executing, the method of converting the Poincare franc into "lawful money of the United States"[43] pursuant to Article 22(4) of the Convention has clearly become a tariff function within the Board's rulemaking role under the Federal Aviation Act.[44]

Pursuant to its statutory mandate, the CAB has continually applied the official price of gold as the appropriate tariff conversion standard for cargo (and other) limits of liability under the Convention.[45] Indeed, contrary to the Court of Appeals' as-

[41]49 U.S.C. §§1374(a) and 1482.

[42]49 U.S.C. §1502.

[43]49 U.S.C. §1373(a).

[44]49 U.S.C. §1301 *et seq.*

[45]*See* App. D at 36-37a. Article 22(2) of the Convention would limit TWA's liability in the present case to $6,475.98 (250 francs per kilogram) because there was no special declaration of a higher value. The aforementioned franc is the "Poincare franc", which by conversion into U.S. dollars per pound at the last official U.S. price of gold ($42.22) per troy ounce) amounts to a limitation of liability of $9.07 per pound (or approximately $20 per kilogram). *See* CAB Order 74-1-16 (January 3, 1974), 39 Fed. Reg. 1526 (1974) (App. F at 48a); and CAB Order 78-8-10 (August 3, 1978), 43 Fed. Reg. 35971 (1978) (App. G at 52a). *See also* 14 C.F.R. §§221.175 and 176. The Court of Appeals apparently mistakenly believed that application of the official rate of gold to Convention limitations was derived solely from the Par Value Modification Act of 1973 and its predecessor. When the Par Value Modification Act adjusted the official rate of gold, the CAB directed the carriers to apply the new rate of conversion in their tariffs. The power to mandate use of the official price was derived from the Federal Aviation Act (*see* CAB Order 72-6-7, June 2, 1972) and not from the Par Value Modification Act. In issuing that Order, the CAB took into consideration a num-

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sumption, more than two years after the Jamaica Accords and the legislation repealing the Par Value Modification Act of 1973, and more than four months after that legislation became effective on April 1, 1978, the CAB valued the cargo limit according to the official price of gold.[46] To this day, international air cargo tariffs[47] filed with and approved by the CAB express Convention liability limits according to the last official price of gold.[48]

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ber of policy factors (of which the Par Value Modification Act was only one), including the continuing application of the Convention. Accordingly, legislation repealing the Par Value Modification Act should not be taken to have precluded the CAB's approval of use of the last official price of gold in air carrier tariffs governed by the Convention.

[46]The CAB stated, with respect to IATA Conditions of Cargo Carriage, "At the present time a carrier's liability for Warsaw traffic . . . is $20 per kilogram. . . ." CAB Order 78-8-10 (August 3, 1978) (App. G. at 52a).

[47]As of January 1, 1983, under "deregulation," U.S. air carriers no longer file domestic air cargo liability tariffs. 14 C.F.R. §399.

[48]However, the CAB has also accepted airline tariffs consistent with the Warsaw Convention and Montreal Agreement using SDRs to measure their liability. *See, e.g.*, Passenger Rule Tariff No. PR-3 (CAB No. 55), Rule 25(D)(1)(a)(ii) (May 30, 1983). Indeed, SDRs have been supported as a unit of conversion by the United States government in connection with the Montreal Protocols. It appears that the Court of Appeals was not aware of the Detailed Report of the United States Delegation to the ICAO International Conference on Air Law, Sept. 1975, to revise Montreal Protocols 3 and 4 to the Warsaw Convention. That report demonstrates that it was the United States that urged the use of SDRs as the unit of conversion for the Montreal Protocols.

SDRs have also been supported as a unit of conversion by the United States in pending non-aviation treaties. *See, e.g.*, United Nations Convention on the Carriage of Goods By Sea (The Hamburg Rules), U.N. Doc. A/CONF. 89/13 (30 March 1978) (limit of liability unit of conversion in SDRs for loss of international maritime cargo (to supersede the Brussels Convention)). The SDR is a unit of account in no less than 15 international conventions (some of which are in effect). Merren, *The*

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Furthermore, despite changes in the use of gold as a currency base and the ongoing Convention amendment process, the latest CAB staff memorandum as to the appropriate unit of conversion affirms the selection of the last official U.S. price of gold by CAB Order 74-1-16 (App. F at 48a):

> [T]he Board's current course of action [use of the official U.S. price of gold as a unit of conversion] is superior to any of the alternatives currently available. . . .
>
> Pending resolution of this issue by the three agencies [CAB, Department of Transportation, Department of State] we believe the Board should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the [CAB] regulations [14 C.F.R. §§221.175 and 221.176 (1981)].

Memorandum to the Board from John Golden, Director, Bureau of Compliance and Consumer Protection, Civil Aeronautics Board, May 20, 1981 (App. H at 58a, 64a-65a).

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SDR as a Unit of Account in Private Transactions, 16 In't Law 503, 505 (1982).

The United States has gone on record in the present case that, unlike the modern French franc or the free market price of gold, both of which would be inappropriate, "the SDR constitutes a potential alternative choice for implementation of the Warsaw Convention's limitation of liability." Brief Amicus Curiae of the United States on Petition for Certiorari, at 4.

SDRs are a potential alternative choice because, if Congress is somehow found to have abandoned gold as an unit of conversion, it would be inconsistent not to find that Congress did so only in connection with legislation supporting the IMF's substitution of SDRs for gold as a unit of conversion. The United States' actions on the official price of gold went hand in hand with the IMF's substitution of SDRs for gold as its reserve asset and unit of account. These were not independent acts but were part and parcel of the same economic restructuring. *See* S. Rep. No. 94-1295, 94th Cong., 2d Sess. 2, reprinted in [1976] U.S. Code Cong. & Ad. News 5935; S. Rep. No. 94-1148, 94th Cong., 2d Sess. 11, reprinted in [1976], U.S. Code Cong. & Ad. News 5950, 5952.

Throughout the delicate process of renegotiating the Convention, the CAB has confirmed a viable conversion standard. Far from following the "law of inertia" as suggested by the Court of Appeals, the CAB, after vigorous internal debate, has acted consistently with the intent of the Convention and has applied the official price of gold. Thus, the CAB has chosen to maintain the stability and effectiveness of a treaty that is adhered to not only by the United States, but also by 126 other sovereign nations.[49]

The Court of Appeals has disregarded the presumptive validity of the CAB orders and, consequently, the historical role that this agency has played in the administration of the United States' obligations under the Warsaw Convention. More important, the manner in which the CAB has thus far dealt with the question of the unit of conversion (even since the repeal of the Par Value Modification Act) constitutes a well-known, long-continued practice that has been acquiesced in by Congress, and it raises a definite presumption of Congressional consent to enforcing the Convention's unit of conversion in terms of the stable, last official price of gold.

Accordingly, the historical record and the basic principles of treaty and statutory interpretation prevent a finding that Congress has abandoned the Convention's unit of conversion or its concept of limiting liability. Indeed, along with the executive branch, Congress has treated the Convention's liability limitations as binding and enforceable. Both the record and the applicable interpretative principles require the conclusion that Congress and the executive branch have manifested an intent that the United States live up to its obligations under the Con-

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[49]Of course, the Court of Appeals' holding that the Article 22(2) liability limitation for loss of cargo was unenforceable in United States courts was only prospective. It applied the last official price of gold as the conversion standard to the specific facts of this case, which must be taken as recognition that, if the limitation is in fact enforceable, the Court of Appeals agrees that the proper unit of conversion is the last official price of gold.

vention, enforcing the limitation of liability provisions and continuing to use the official price of gold as the unit of conversion.

Conclusion

The decision of the United States Court of Appeals for the Second Circuit should be affirmed insofar as it applied the last official U.S. price of gold as the conversion standard to the specific facts of this case. That decision's further holding that the Warsaw Convention's Article 22(2) limitation on liability for loss or damage to cargo is to be prospectively unenforceable in United States courts should be reversed with a direction that the last official U.S. price of gold (or, in the alternative, the SDR) is the proper conversion standard for the limitation.

Respectfully submitted,

RANDAL R. CRAFT, JR.
PETER HOENIG
RANDI L. BRESLOW
HAIGHT, GARDNER, POOR & HAVENS
One State Street Plaza
New York, New York 10004
(212) 344-6800

Counsel for Amicus Curiae
International Air Transport Association

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